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No. 06-1188

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL,
AND STATE OF WASHINGTON,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

THOMAS A. CAMPBELL
KEVIN M. FONG
GERALD F. GEORGE
PILLSBURY WINTHROP
SHAW PITTMAN LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1000

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MARK A. PERRY
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner Teck Cominco Metals, Ltd. ("Teck Cominco") respectfully submits this supplemental brief in response to the brief of the United States as *amicus curiae* filed on November 20, 2007.

That the United States seeks to insulate from review a decision as massively accretive to its jurisdiction as the decision below is unsurprising. "The [Environmental Protection Agency], like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction." *Great Atlantic & Pac. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U.S. 147, 156 (1950) (Douglas, J., concurring). Tellingly, however, the United States offers *not one word* in defense of the merits of that decision. The United States does not—presumably because it cannot—explain how a *Canadian* company, acting in accordance with *Canadian* law, that disposed of waste only in *Canada* could have "arranged for disposal" of that waste at a "facility" within the *United States*, as CERCLA requires. *See* 42 U.S.C. § 9607(a)(3)-(4); *see also* Pet. 18-21. Nor does it make any effort to reconcile the Ninth Circuit's expansive interpretation of CERCLA with this Court's command that when "[a] statute's language reasonably permits an interpretation" that avoids giving it extraterritorial effect, a court "should adopt it." *F. Hoffmann LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 174 (2004). And nowhere does the United States defend the Ninth Circuit's line-editing of CERCLA's statutory text—inserting, without a trace of embarrassment, an "or" that Congress supposedly forgot—to manufacture an "arranger" liability provision that, countertextually, requires no "arrangement" at all.

With nothing to say in support of the Ninth Circuit's statutory construction, the United States retreats to arguments that this case is an undesirable vehicle for resolving the questions presented and that those questions are unimportant in any event. While the desire of the United States to evade this

Court's review of EPA's unprecedented aggrandizement of authority (and the necessity of taking a position on the merits) may be understandable, its arguments in support of that result are not. The vehicular issues raised by the United States are makeweight, and the questions presented, important at the time the petition was filed, have become no less so in the five months since this Court called for the views of the Solicitor General.

I. THE UNITED STATES' ATTEMPTS TO DEFLECT ATTENTION FROM THE MERITS ARE UNAVAILING

1. The United States contends that EPA's withdrawal of its Unilateral Administrative Order ("UAO") mooted respondents' citizen-suit claims for civil penalties and attorneys' fees and, along with those claims, Teck Cominco's interlocutory appeal from the denial of its motion to dismiss them. The United States is very clearly wrong. Even if respondents' citizen-suit *claims* are moot—and respondents doubtless dispute that premise—Teck Cominco's *appeal* is not.

a. Whatever the merits of the United States' contention that EPA's withdrawal of its UAO mooted respondents' citizen-suit claims, it remains, at this stage in the proceedings, merely the argument of an *amicus curiae*. On the other hand, the decision below, which expressly concluded that the claims "are not moot," Pet. App. 9a n.10, appears to be law of the case. *See, e.g., Old Person* v. *Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002). If that is so, respondents' citizen-suit claims could be dismissed as moot *only* if the decision below first is vacated—a result that would require a grant of certiorari, rather than the denial advocated by the United States.

b. In any event, Teck Cominco's *appeal* is not moot.[1] Teck Cominco's appeal would be moot only if EPA's with-

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[1] Of course, the *case* is not moot, and to the extent the government suggests otherwise (at 7-8), it is wrong. Even on the United States' view, respondents' amended complaint states two "live claims." U.S. Br. 12. Those "remaining live issues supply the constitutional requirement of a case or controversy." *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969).

drawal of its UAO "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). That bar is not a high one. In *Lopez* v. *Gonzalez*, 127 S. Ct. 625 (2006), this Court agreed with the parties that petitioner's appeal from his deportation order was not mooted by his *volunteering* to be deported. *Id.* at 629 n.2. "Lopez can benefit from relief in this Court," the Court held, because prevailing on his "aggravated felony" contention would enable him to pursue his application for cancellation for removal that would, were the Attorney General to exercise his discretion to grant it, permit petitioner to return to the United States. *Id.*; *see also Lopez* v. *Gonzalez*, No. 05-547, Brief for Respondent (Acquiescence) at 6 n.5 (Jan. 24, 2006).

That Teck Cominco's appeal is interlocutory—and therefore a creature of circumscribed appellate jurisdiction—does not alter the analysis. *See Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 313-18 (1999). In *Grupo Mexicano*, petitioners took an interlocutory appeal from the entry of a preliminary injunction. *Id.* at 313. While that appeal was pending before the Second Circuit, the district court granted summary judgment to respondents and converted the preliminary injunction into a permanent injunction. Notwithstanding the general rule that appeals from preliminary injunctions are mooted by the entry of a permanent injunction, "because the former merges into the latter," the Court held that petitioners' "potential cause of action against the injunction bond preserves our jurisdiction over this appeal." *Id.* at 314.

For Teck Cominco, the benefits of Supreme Court review are far less speculative than a contingent cause of action (sufficient to prevent mootness in *Grupo Mexicano*) or eligibility for discretionary relief from the judgment below (sufficient in *Lopez*). Like respondents' claims for civil penalties, respondents' concededly live cost-recovery and natural-resource-damage claims depend upon a finding that Teck

Cominco is a covered arranger under Section 107(a)(3) and (4) of CERCLA. *See* 42 U.S.C. § 9607(a). The United States does not dispute that a decision in favor of Teck Cominco on either of the questions presented would compel dismissal of all of respondents' claims. Nor does it dispute that, absent review, the decision below will be just as dispositive of petitioner's defense that it is not a "covered person[]" with respect to respondents' live claims as it was with respect to the citizen-suit claims.

Instead, the United States suggests (at 13)—quite disingenuously—that Teck Cominco may have other defenses to respondents' live CERCLA claims.[2] But even if the United States is correct that Teck Cominco has other *merits* defenses available to it, that would not diminish the value of its asserted *jurisdictional* defense—that it is not a covered person under CERCLA. The latter entitles Teck Cominco to immediate dismissal, while the former holds out, at most, the possibility of summary judgment after the completion of discovery. It is too plain for argument that entitlement to dismissal of *all* pending claims constitutes "effectual relief."

Far from a jurisdictional barrier to this Court's review, the United States has identified, at most, an alternative basis upon which this Court might grant Teck Cominco relief from the decision below. Only in an analysis as bizarrely misconceived as the United States' could the presence of an *additional* error itself compel a *denial* of review. If the decision below conflicts with *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation*, 484 U.S. 49 (1987), in the manner the United States suggests, that would militate in favor of a grant of certiorari, *see* S. Ct. R. 10(c), or perhaps, a GVR. *See Dupris* v. *United States*, 446 U.S. 980, 980 (1980) ("Judgment is vacated and the case is remanded to the . . . District Court . . . to consider the question of mootness").

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[2] The United States asserts that Teck Cominco may have a defense to respondents' cost-recovery claims, but identifies no similar defense to respondents' natural-resource-damages claims.

c. But even if the United States were correct that Teck Cominco's interlocutory appeal is moot, the government would be (and is) absolutely wrong to suggest that such mootness would "not necessarily require vacatur of the court of appeals' judgment." U.S. Br. 11. For at least three reasons, vacatur would be required.

First, if Teck Cominco's appeal is moot, then it became so on the day EPA withdrew its UAO, almost a month before the court of appeals entered judgment. The Ninth Circuit thus would have lacked jurisdiction to entertain Teck Cominco's interlocutory appeal. Once noticed, this Court is bound to correct such an error; the fact that Teck Cominco did not seek certiorari on this jurisdictional question is irrelevant. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 72-73 (1997) ("if the . . . lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it").

Second, because only the claims on appeal—but not the underlying case—would be moot, this case would not be controlled by *U.S. Bancorp Mortgage Company* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994). Rather, it would be controlled by *Deakins* v. *Monaghan*, 484 U.S. 193 (1988), where this Court held that "[w]hen a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint." *Id.* at 200. Likewise, in *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981), the Court held that when "one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot," "the judgment of the Court of Appeals must be vacated." *Id.* at 394. Indeed, this Court has specifically rejected the remedy of dismissal in these circumstances, holding that though it may be "appropriate when an entire case has become moot," dismissal is "inappropriate when only the issues raised on appeal have been resolved." *Crowell* v. *Mader*, 444 U.S. 505, 506 (1980) (per curiam).

Third, to the extent that it is relevant at all, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), affirmed that, "[w]hen a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Arizonans for Official English*, 520 U.S. at 71 (quoting *Munsingwear*, 340 U.S. at 39). *Bonner Mall* establishes a narrow exception to that "established practice"—to wit, when the petitioner has procured the mootness of the appeal by "voluntarily forfeit[ing] his legal remedy" through a settlement with the respondent. 513 U.S. at 25. Vacatur may be denied when "[t]he judgment is not unreviewable, but simply unreviewed by [petitioner's] own choice." *Id.* Any fair reading of Teck Cominco's Motion for Judicial Notice demonstrates that Teck Cominco did not intend, by settling with EPA, to moot its appeal of the district court's determination that it is a covered person under CERCLA. Particularly given the possibility that the decision below, if left undisturbed, would be law of the case as to Teck Cominco's liability as an arranger, vacatur is appropriate to "clear[] the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40.

2. This case's interlocutory posture will not undermine this Court's review. The United States speculates that "respondents might argue on remand" that Teck Cominco is covered by CERCLA as "an operator or transporter" and that "it is at least possible that discovery will reveal" evidence to support such a conclusion. U.S. Br. 14. This transparently outlandish conjecture is refuted by respondents' amended complaints, which allege only that Teck Cominco is an arranger, *see* Pakootas' Am. Compl. at 9-11; First Am. Compl. in Intervention 7-8, and the briefs in opposition, which suggested no alternate theory of liability. *See* Rule 15.2. The government's surmise also is refuted by common sense: If the Ninth Circuit's decision that Teck Cominco is a covered "arranger" is allowed to stand, it is difficult to see why respondents would undertake the effort to pursue an alternate

theory on remand. In any event, this Court recently confirmed—at the United States' strong urging—that such speculation as to the evidence that discovery "might" "possib[ly]" reveal is an insufficient basis to deny a motion to dismiss. *See Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007).

II. On The Merits, The Decision Below Is Important And Warrants Immediate Review

The United States acknowledges that this case "represents the only time in the 27 years since CERCLA's enactment" that a U.S. court held a foreign person to be a "covered person" under CERCLA based upon its foreign conduct. The government nevertheless maintains that the decision below "lacks sufficient importance to warrant review at this time." U.S. Br. 15, 16. The United States' arguments are unpersuasive.

1. The United States contends (at 15-16) that the first question presented in the petition—whether the Ninth Circuit correctly interpreted CERCLA "to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws" (Pet. i)—is unimportant because it is unlikely to recur. But to prove its point, the government cites only the facts that the question is one of "first impression"—that, until this case, not even EPA had dared to impugn a foreign person under CERCLA for its foreign conduct—and that EPA has now withdrawn that first-of-its-kind order. Even if this Court could locate in this line of reasoning an implicit promise on behalf of the United States that EPA will never again be permitted to use CERCLA to sanction foreign conduct, after this Court's decision in *United States* v. *Atlantic Research*, 127 S. Ct. 2331 (2007), the government could not similarly restrain private CERCLA litigants. If CERCLA reaches foreign disposal conduct, there is no reason to believe that CERCLA potentially responsible parties (PRPs) will exclude foreign persons from their cost-recovery actions. Thus, if the "comity question" is, today, one of "first impression," it will not remain so for long.

The United States next argues that this Court should defer resolving the "comity question" because the Ninth Circuit's result in this case is "consistent with considerations of international comity." U.S. Br. 16. As a threshold matter, the inquiry at this stage in the proceedings is not (as the United States would have it) whether principles of international comity preclude the Ninth Circuit's result, but rather, whether the decision's effects on the harmony of relations—*i.e.*, comity—between the United States and Canada mark this case as one of exceptional importance.[3] The answer to the latter inquiry is clear: Canada took the extraordinary step of filing a brief in this Court to argue that "the Ninth Circuit's decision offends comity." Br. Amicus Curiae Government of Canada 14. The United States' self-serving assertion that the decision below "does not 'threaten[] to disrupt our ties with Canada'" (U.S. Br. 16) is just that. Whatever the United States' view as to whether, on these facts, Canada is justified in being upset by the Ninth Circuit's extraterritorial application of CERCLA, Canada's *actions* fairly indicate its displeasure.

Moreover, the United States' comity analysis fails even on its own terms. The United States says that comity principles do not preclude jurisdiction here because "[p]etitioner's conduct could arguably be analogized . . . to firing a gun across the border." U.S. Br. 17. That is a canard. A foreign person's liability under CERCLA—a statute that supposedly assigns liability without regard to intent or fault—could not possibly turn on whether its foreign disposal conduct was "deliberate" or the domestic effects of that conduct assertedly "direct[] and foreseeabl[e]." *See* 42 U.S.C. § 9607(a). More

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[3] Even at the merits phase, the fact that principles of international law would permit the United States (on its view) to proscribe Teck Cominco's foreign conduct does not answer the question presented in the petition whether the Ninth Circuit correctly interpreted *CERCLA* to sanction foreign conduct. That is a question of statutory construction, informed (but certainly not controlled) by principles of international comity, including the presumption against extraterritorial application of domestic laws.

to the point, though, Teck Cominco did not obtain permits from Canadian authorities to launch bullets or—as hypothesized by the Ninth Circuit at oral argument, missiles—into the United States. Teck Cominco was permitted by Canadian authorities to dispose of ostensibly benign waste into a river in *Canada*. And because Teck Cominco did not "fire[]" "a gun" "across a border," the United States has no basis for distinguishing Teck Cominco's supposed pollution of U.S. soil from that emanating from more "[d]istant sources."[4] U.S. Br. 18. Permitting this question "to percolate" as the United States suggests (at 14-15) will lead only to increased application of CERCLA to foreign disposal conduct and accompanying international discord.

2. With respect to the second question presented—whether the Ninth Circuit erred in concluding that CERCLA's arranger liability provision "does not require the involvement of any 'other party or entity'" (Pet. i)—the United States parrots respondents and argues that the First Circuit's statement that "for arranger liability to attach, the disposal or treatment must be performed by another party or entity," *American Cyanamid* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004), was just "*dictum*." U.S. Br. 19-20. But the United States has no answer whatsoever to Teck Cominco's argument on reply that, under the arranger liability provision, the question whether an alleged arranger must own or possess the waste is inextricably linked to the question whether the disposal or treatment must be performed by another party or entity, and that the answer to both questions turns on how one interprets the key phrase "by any other party or entity."

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[4] The United States suggests that federal courts might decline to "exercise jurisdiction" in cases involving "[d]istant sources" of pollution, and that such *ad hoc* international-comity abstention would provide a sufficient check on the extraterritorial application of CERCLA. U.S. Br. 18. But when this Court confronted the identical argument in the context of the Sherman Act, it forcefully rejected it. *See Empagran*, 542 U.S. at 168 (rejecting international-comity abstention as "too complex to prove workable" as a limitation on extraterritorial application of U.S. law).

Both the First Circuit and the court below recognized as much, and while the First Circuit interpreted "by any other party or entity" to modify the phrase "disposal or treatment," *Am. Cyanamid*, 381 F.3d at 24, the Ninth Circuit considered and rejected that approach, concluding instead that "by any other party or entity" expanded disjunctively the preceding clause, "owned or possessed by such person," and unabashedly inserted an "or" in between the two clauses to accomplish the feat. The Ninth Circuit's holding as to the correct construction of "by any other party or entity" conflicts intractably with the First Circuit's construction of the same statutory phrase. This Court should settle the disagreement as to the meaning of this important federal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS A. CAMPBELL
KEVIN M. FONG
GERALD F. GEORGE
PILLSBURY WINTHROP
SHAW PITTMAN LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1000

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MARK A. PERRY
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

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